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IN THE SUPREME COURT
STATE OF MICHIGAN

Appeal from the Court of Appeals
Cooper, P.J., Sawyer and Owens, J.J.
Court of Appeals #232780

THERESA O"DAY DEROSE
(a/k/a THERESA SEYMOUR), **Docket #121246**

Plaintiffs/Third-Party Defendant-Appellee,

v

JOSEPH ALLEN DEROSE,

Defendant-Appellee

v

CATHERINE DEROSE,

Third Party Plaintiff-Appellant

AMICUS BRIEF OF THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN

MINORITY POSITION

John F. Mills (P27587)
For the Family Law Section
Minority Position
380 N. Old Woodward, Ste. 300
Birmingham, MI 48009
(248) 642-0333

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is properly vested pursuant to MCR 7.301(A)(2). The Family Law Section of the State Bar of Michigan was invited to participate as *amicus curiae* upon invitation by the Court to persons or groups interested in the determination of the questions presented in this case to move the Court for permission to file a brief *amicus curiae.* The Family Law Section wishes to file two briefs espousing both a majority position and a minority position as determined by a vote of the Family Law Council on December 7, 2002. The Section filed its motion for permission to file briefs for both the majority and the minority viewpoints of the Section concurrent with filing the Majority Position Brief on Appeal on or about January 6, 2003. The Majority Position is authored by Karen Sendlebach, Esq. and the Minority Position by the undersigned.

STATEMENT OF QUESTIONS INVOLVED

A. Whether the Court of Appeals erred in invalidating Michigan's grandparent visitation statute, MCL 722.27b, on constitutional grounds?

Third-Party Plaintiff-Appellant Answers:	Yes
Plaintiff-Third Party Defendant Appellee Answers:	No
Defendant:	Did Not Participate
Court of Appeals Answers:	No
Amicus Family Law Section Minority Opinion:	Yes

B. Whether the Court of Appeals erred in finding the "best interests of the child" legal standard provides inadequate guidance to the trial courts in ruling on motions/actions for grandparenting time?

Third-Party Plaintiff-Appellant Answers:	Yes
Plaintiff-Third Party Defendant Appellee Answers:	No
Defendant:	Did Not Participate
Court of Appeals Answers:	No
Amicus Family Law Section Minority Opinion:	Yes

STATEMENT OF INTEREST

The State Bar of Michigan is a public body corporate established pursuant to 1935 PA 58, and regulated pursuant to Const 1963, art 6, §5 and PA 58 by the Michigan Supreme Court. The Family Law Section of the State Bar of Michigan is a duly authorized section of the Bar whose purpose is "to study the laws, court rules and procedures pertaining to the family and all relationships relevant thereto, including but not limited to marriage, divorce, separation, adoption, paternity and the rights of minor children...and by preparing and sponsoring and publishing legal writings in this field."[1]

Throughout its history as a section of the State Bar of Michigan, the Family Law Section has monitored the progress of cases moving through the Court of Appeals and the Michigan Supreme Court which have an impact on the core issues set forth in the Section's statement of purpose set forth above. Whenever it has been appropriate to do so, the Section has requested leave to file briefs *amicus curiae* with the Court in order to assist the Court in reaching a decision which will impact Michigan families and the attorneys that serve them.

The Family Law Council undertook a debate of the issues involved in this case at its regularly scheduled meeting of December 7, 2002.[2] The purpose of the debate was to determine (a) whether to request leave of the Court to file a brief *amicus curiae;* and (b) what position should be adopted by the Section for communication to the Court in this matter. The Council overwhelmingly voted to request leave to file *amicus curiae* briefs

[1] Bylaws of the Family Law Section of the State Bar of Michigan, Section 1.2
[2] The Family Law Council is the duly elected 21-member governing body of the Family Law Section.

in this matter. The ensuing debate on the position, however, failed to establish a clear mandate as to which position the Section should espouse in its *amicus curiae* brief to the Court. The Council debated its position for over two hours and its eventual vote reflects the split of opinion on this important issue as exemplified by the Court of Appeals split decision. Following the debate, 12 Council members voted to urge affirmation of the Court of Appeals decision while 8 Council members voting to urge reversal.[3] One Council member was absent and therefore did not participate in the debate or the vote.

Faced with the lack of a clear mandate, the Council undertook further discussion on how best to convey its position to the Court. The solution arrived at was to seek leave to file two briefs espousing both the majority opinion of the Council as well as the minority opinion. This solution is considered by the Council to be the best way to communicate facts, impressions and conclusions of Council members on both sides of the issue to the Court for the Court to use in its deliberations on this issue of great importance to Michigan families, particularly Michigan grandchildren and grandparents eager to maintain a relationship with each other following a divorce by the parents.

[3] Significantly, the 4 *ex-officio* former Chairs of the Section, who were present at the meeting, participated in the debate and voted in an advisory capacity only. All voted for reversal.

SUMMARY OF ARGUMENT

The Family Law Section of the State Bar of Michigan adopts, as its minority position, the viewpoint that the statute permitting grandparent visitation (MCL 722.27b) is in fact constitutional and is a logical, consistent expression of the intent of the Michigan legislature as set forth in the Child Custody Act (MCL 722.21 et seq) to permit grandparents to continue a relationship with grandchildren affected by the divorce of their parents. Further, Michigan's Grandparent Visitation Statute is distinguishable from those statutes, such as the Washington statute, found to be "breathtakingly broad" and therefore unconstitutional under *Troxel v Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 49 (2000). Lastly, contrary to the position taken by the majority below, the Family Law Section maintains that Michigan's "Best Interest of the Child" statute (MCL 722.23) is much narrower than similar statutes found to be unconstitutional under *Troxel* further supporting the constitutionality of MCL 722.27b.

LAW AND ARGUMENT

This matter has been briefed in the trial court, the Court of Appeals and here by Appellant and Appellee. The Court has the benefit of all the aforementioned briefs as well as the Court of Appeals decision containing a recitation of the facts and background history of this case. In this presentation, counsel adopts the previous recitations of facts and will proceed directly to argument.

A. Michigan's Grandparent Visitation Statute, MCL 722.27b, is presumed constitutional and must be held to be constitutional unless its unconstitutionality is clearly apparent.

The minority position of the Family Law Section is in agreement with the dissent presented by Judge Jessica R. Cooper in the *DeRose* Court of Appeals decision, to wit: Michigan's Grandparent Visitation Statute, MCL 722.27b, is presumed constitutional and must be held to be constitutional unless its unconstitutionality is clearly apparent. *DeRose v DeRose*, 249 Mich App 388, 643 N.W.2d 259 (2002).

In *Taylor* v *Gate Pharmaceuticals*, 248 Mich App 472, 477; 639 NW 2d 45 (2001), it was held: "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent."

In interpreting a statute, it is this court's duty to ascertain the meaning thereof, to give it full force and effect, to draw inferences from the Legislature's intent, as gathered from a view of the act in its entirety, and to render effectual the

specific things included in the broad terms and purposes of the Act. *Municipal Investors Association* v *City of Birmingham*, 298 Mich 314, 299 NW 90 (1941).

In *Taylor*, supra at 478, the Michigan Court of Appeals reiterated the long standing precedent that before rendering a specific statute enacted by the Legislature unconstitutional, the court must read the Act as a whole. Accordingly, when addressing the issue of constitutionality as it relates to Michigan's Grandparent Visitation Statute (MCL 722.27b), inquiry must be made into the Michigan Child Custody Act (MCL 722.21 et seq.), as the Grandparent Visitation Statute is part of the larger Child Custody Act. The entire act must be read as a whole, not dissected and analyzed in a piece-meal fashion. *Taylor* specifically held as follows:

A. The Act must be read as a whole;

B. The Act carries a *presumption of constitutionality;* and

C. The standards must be as reasonably precise as the subject matter requires or permits. *Taylor* at 478-479.

Our Child Custody Act, when read as a whole, contains the necessary presumptions to satisfy the safeguards which were the primary issue of concern in *Troxel* when there is a dispute between a parent and a third party.[4] MCL 722.25 states that if a dispute occurs between parents or between third parties, the best interests of the child control. Further, the statute directs the court to presume that the best interests of the child are served by awarding custody to the parent(s),

unless the contrary is established by clear and convincing evidence. In domestic relations cases, there is no higher standard. Clearly, the Michigan statute as embodied in the Child Custody Act contains sufficient assurances that the wishes of the parent are paramount when faced with a grandparent visitation challenge.

B. MCL 722.27b is distinguishable from those statutes, such as the Washington statute, found to be "breathtakingly broad" and therefore unconstitutional under *Troxel* v *Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 49 (2000).

In a split decision, the Michigan Court of Appeals held MCL 722.27b unconstitutional due to the "...lack of standards in the Michigan statute beyond 'best interests of the child,' and, specifically, the failure of the statute to afford any deference to the custodial parent's decision." *DeRose*, supra at 395. The Court concedes the fact that Michigan's statute is narrower in scope than Washington's objectionable statute (ARCW 26.09.160) in terms of standing to file a visitation petition. What the lower court fails to recognize is that the added protections in the Michigan statute to posture a case for a best interests analysis are a critical difference in the two statutes and separate Michigan's statute from the 'breathtakingly broad" language and effect of the Washington statute and similar statutes found to be objectionable.

As pointed out by Appellant in this appeal, the State of Washington had two third-party, non-parental visitation statutes, to wit: ARCW 26.09.240 and 26.10.160. The first is known as their Grandparent Visitation Statute. The

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[4]The issue of presumptions, deference, and the "breathtakingly broad" nature of the Washington Statute is more fully outlined in argument "B" contained herein.

second is a broad, non-parental visitation statute. While the *Troxel* decision turned on an examination of ARCW 26.10.160, the other statute (ARCW 26.09.240) also contained a provision whereby "A person other than a parent may petition the court for visitation with a child **at any time** or may intervene in a pending dissolution, legal separation, or modification of parenting plan proceeding." ARCW 26.09.240(1) (emphasis supplied). Thus, it would appear that either Washington statute would have been found unconstitutional due to the "any person at any time" language contained in both statutes.

Michigan's statute is easily distinguished from either Washington statute by the restrictive provisions defining who may petition the court for "visitation" and when that petition may be initiated. Under the Michigan statute, a petition may **only** be brought by the parent of a legal parent of the child or children with whom visitation is sought. The parents of a putative father, therefore, lack standing under Michigan's statute to petition for grandparent visitation. Washington, on the other hand, permits a petition by "any person able to demonstrate by clear and convincing evidence that a significant relationship exists with the child with whom visitation is sought." ARCW 26.09.240(3). This opens the potential class of petitioners up to grandparents, great-grandparents, aunts, uncles, friends of the family, educators, counselors, friends of the family, and anyone else who can meet the broadly-worded standard set forth in the statute. Michigan, on the other hand, limits the potential number of petitioners to no more than four people per family, to wit: the paternal and maternal grandparents.

Michigan further limits the opportunity to petition for grandparent visitation to situations involving a child custody dispute pending before the court. "Child custody dispute" is defined in the statute as including divorce, legal separation, guardianship action or other situations in which custody is given to persons other than the parents of a child. Restricting the right to petition even further, the Michigan statute provides that a grandparent may not file more than once every 2 years, absent a showing of good cause, a complaint, or motion seeking an order for grand-parenting time.

In *Blakely v. Blakely,* 83 SW3d 537 (2002), the Supreme Court of Missouri upheld Missouri's Grandparent Visitation Statute as being constitutionally valid in light of the *Troxel* decision. Missouri's statute is similar in many respects to Michigan's statute and the comments of the *Blakely* court are instructive.

In comparing Missouri's statute to Washington's, the *Blakely* court said:

> "First, in contrast to Washington, which allowed visitation to *any* noncustodial person, Missouri limits visitation to 'the grandparents of the child...' [citation omitted]. Consequently, the statute 'does not create the potential of subjecting parents' **every decision** to **review** at the **behest** of **endless third parties**." *Blakely,* supra at 544 (emphasis contained in original opinion).

Like Missouri, Michigan limits its statute to grandparents of a child.

The Missouri court goes on to say:

> "...unlike Washington, Missouri's legislature has balanced the interests involved and provided that to be entitled to visitation, grandparents must meet the threshhold requirement of demonstrating that parents have 'unreasonable denied' visitation for a period exceeding 90

> days. Thus, unlike in *Troxel,* a grandparent does not have automatic standing to seek visitation." *Blakely,* supra at 544.

While Michigan does not restrict grandparents to a petition only after a 90-day denial of visitation, it does limit a grandparent's right to petition for visitation to a pending child custody dispute, and then, in most circumstances, not more frequently than every 2 years. Like Missouri, therefore, Michigan's statute does not provide a grandparent automatic standing to seek visitation.

The Missouri statute imposes a burden on the petitioner-grandparent "...of proving that [a] denial of visitation was 'unreasonable.'" *Troxel* criticized the Washington statute for its failure to impose such a requirement. *Blakely,* supra at 545.

Michigan's statute does not require the petitioner to show that any denial of visitation was unreasonable. However, Michigan, unlike Washington, clearly places the burden of proving that grandparent visitation is in the best interests of the child squarely on the petitioner-grandparent. Again quoting the *Blakely* court:

> "...the effect of [imposing such a burden] is to accord the decision of the parents the kind of rebuttable presumption of validity that *Troxel* suggests is appropriate. It places on the grandparents an onerous but appropriate burden in light of a parent's fundamental right to make decisions relating to the care and custody of a child." *Blakely,* supra at 545.

Finally, both the Michigan and Missouri statutes, unlike the Washington statute, do not simply leave the best interests issue to the "unfettered discretion of the trial judge." Rather, the focused and exacting factors contained in MCL 722.23 assist the Michigan trial courts in making decisions based on information

and accountability as opposed to orders that are based on "mere disagreement" such as occurred in *Troxel*. See *Troxel*, 530 U.S at 68, 120 S.Ct. 2054.

Thus, the ability of a qualified petitioner to get a matter before the court is far more restrictive in Michigan than in Washington and substantially limits the number of people able to petition and the circumstances under which a petition will be heard. Further, imposing a burden of prevailing properly upon the petitioner-grandparent sets up a de facto presumption that the prior decisions of the parent to withhold or deny visitation are meritorious assuming, of course, that the parent is fit to make such decisions. If that presumption cannot be overcome by the grandparent, visitation simply won't occur as the grandparent will not have prevailed. These points all clearly separate Michigan's statute from the "breathtakingly broad" standard exemplified by the Washington statutes and found to be objectionable under *Troxel*. Rather, it distinguishes Michigan as one of the states whose statute meets the requirements set forth in the *Troxel* decision for a valid grandparent visitation law.

C. Michigan's "Best Interest of the Child" statute, MCL 722.23, is more focused than similar statutes found to be unconstitutional under *Troxel*.

The *DeRose* majority in the Court of Appeals decision identifies the "lack of any standards in the Michigan statute beyond 'the best interests of the child'" as a fatal flaw in the Michigan statute concluding, erroneously, that the "Michigan statute is not narrower [than Washington's] once a petition is properly before the

trial court." *DeRose*, supra. By implication, the Court equates the State of Washington's flexible version of "best interests of the child" as contained in ARCW 26.09.002 and further outlined in ARCW 26.09.240(6) with the more focused Michigan version contained in MCL 722.23. An examination of the two statutory standards makes it clear that Michigan's analysis is more focused and explicit in its scope and therefore far superior to that of Washington's as a means of determining whether or not a trial court will permit visitation by one or more of the narrow class of persons able to petition under the Michigan Grandparent Visitation statute.

The Best Interests of the Child determination in the State of Washington begins with the policy statement contained in ARCW 26.09.002, which states:

> Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm. ARCW 26.09.002.

Under the Washington Grandparent statute, however, the code attaches several factors to the overall best interests statement as set forth in ARCW 26.09.002 as follows:

"The court may consider the following factors when making a determination of the child's best interests:

(a) The strength of the relationship between the child and the petitioner;
(b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
(c) The nature and reason for either parent's objection to granting the petitioner visitation;
(d) The effect that granting visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
(e) The residential time sharing arrangements between the parents;
(f) The good faith of the petitioner;
(g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and
(h) Any other factor relevant to the child's best interest.
ARCW 26.09.240(6).

Michigan, on the other hand, has a more focused definition of best interests of the child contained in MCL 722.23, which is used in any proceeding conducted under the Child Custody Act (MCL 722.21 et seq). Michigan's statute reads as follows:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.
(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.
(g) The mental and physical health of the parties involved.
(h) The home, school, and community record of the child.
(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
(l) Any other factor considered by the court to be relevant to a particular child custody dispute.
MCL 722.23.

A comparison of the two statutory schemes reveals several important distinctions which point out the fallacy in the Court of Appeals' statement that "...the Michigan statute is not narrower once a petition is properly before the trial court." *DeRose*, supra at 395. In fact, it is significantly narrower.

First, the Washington statute sets up a **presumption** that grandparent visitation is in the child's best interests upon a mere showing that a significant relationship exists between the child and the grandparent. That presumption must then be rebutted by the parent showing the court, by a preponderance of the evidence, that grandparent visitation would endanger the child's physical, mental, or emotional health. ARCW 26.09.240(5).

In contrast, the Michigan statute establishes no such presumption in favor of grandparent visitation but, rather, requires a hearing to determine whether grandparent visitation would in fact be in the child's best interests. The Washington basis to defeat the statutory presumption is limited to a showing of endangerment to the child's physical, mental or emotional health while Michigan

allows a full hearing on all twelve of the best interest factors before making a decision on grandparent visitation.

Of greatest significance is the difference in the posture of the parties in the respective states. In Washington, the petitioner-grandparent enters the hearing with the **statutory presumption in place** that grandparent visitation is in the child's best interests. The burden is clearly upon the respondent-parent to prove otherwise. In Michigan, however, the petitioner-grandparent enters the hearing having to prove to the court that grandparent visitation is indeed in the child's best interests. The burden, therefore, is properly with the petitioner and not with the respondent-parent to prove otherwise.

Secondly, the Washington statute makes consideration of the factors contained in ARCW 26.09.240(6) **optional** in addition to the general best interests statement contained in ARCW 26.09.002 as opposed to Michigan which makes consideration of the factors listed in MCL 722.23 mandatory.

Thirdly, the Washington analysis sets forth eight specific factors to be considered in assessing whether Grandparent visitation is in the best interests of the child. The eight factors summarized in ARCW 26.09.240(6) cover only five of the 12 factors listed by Michigan in MCL 722.23. Washington's factors (a), (b) and (d) are all covered under Michigan's factor (a). Washington's factors (c) and (f) are covered by Michigan's factor (j). Washington's factor (e) is covered by Michigan's factor (d). Washington's factor (g) is covered by Michigan's factor (f) and Washington's "catch-all" factor (h) is substantially identical to Michigan's

factor (l). A Michigan trial court would, therefore, examine a matter on seven additional factors not covered by a Washington counterpart.

CONCLUSION

The grandparent visitation statute (MCL 722.27b) passed by the Michigan legislature and relied upon by thousands of grandparents statewide since passage is constitutional in all respects and should be recognized as such by the Michigan judiciary. It is easily distinguished from the class of overly broad statutes ruled to be unconstitutional in *Troxel v Granville*, supra and should be upheld as a constitutional expression of the intent of the Michigan legislature to provide continuity to the close relationship which develops between children of a marriage and their grandparents after the marriage between the intervening generation -the parents -has ended.

The statutory language, standards, and presumptions are all found under the umbrella of the larger Child Custody Act. Its terms, therefore, necessarily apply to all disputes under the statute -- including those involving grandparent visitation. The intent of the Legislature when enacting the Child Custody Act was clearly to give significant deference to the intrinsic rights of parents when a dispute occurs between the parents of a child and a third party, such as a grandparent in a grandparent visitation dispute. With the establishment of that deference creating a presumption that the best interests of a child are served by awarding custody to the parent(s), there is no rational legal basis to conclude that Michigan's Grandparent Visitation Statute, MCL 722.27b, is anything but constitutional. Moreover, the "unconstitutionality" of the statute is not apparent and thus, pursuant to current case law, must be upheld (See *McDougall* v *Schanz*, 461 Mich 15, 24; 597 NW 2nd 148 (1999) and *Taylor*, supra at 477).

The Michigan statute is much more narrowly drawn than the Washington statute and other statutes around the country which have been found unconstitutional and, consequently, should be upheld. The Michigan statute setting forth the standards for determination of what is in the best interests of a child (MCL 722.23) contains sufficient protections for the child, parent and grandparent and is mandated to be used in determining grandparent rights under MCL 722.27b.

RELIEF REQUESTED

For the reasons set forth above, the Family Law Section of the State Bar of Michigan (minority position) urges this court to reverse the holding of the Michigan Court of Appeals below and order MCL 722.27b constitutional as enacted.

Respectfully submitted:

January 6, 2003

John F. Mills (P27587)
For the Family Law Section of the State Bar of Michigan, *Minority Position*
380 N. Old Woodward, Ste. 300
Birmingham, MI 48009
248-642-0333